

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Santa Barbara
(County File No. 43-ACP-SB-05/06)

Docket. No. 146

DECISION

**L & M Agricultural, LLC
2223 South Oakley
Santa Maria, California 93455**

Appellant/

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners (CACs) may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Santa Barbara CAC found that the Appellant, L & M Agricultural, LLC, committed three violations of 3 CCR sections 6626(a), 6734(a) and (b)¹, and 6734(c). The commissioner imposed a total penalty of \$800 for the three violations.

Appellant appealed two of the violations from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides matters of law using her independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

¹ While two separate sections are cited, the Santa Barbara CAC evidently combined the elements of 3 CCR sections 6734(a) and 6734(b) into one violation.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

Factual Background

The Santa Barbara CAC issued a Notice of Proposed Action on July 20, 2006, to the Appellant for three violations of California's pesticide laws.

Violation one found that the Appellant had failed to submit its pesticide use reports (PURs) for its pesticide applications for 2005 until February 2006. There is information in the record that the Appellant submitted its PUR for the month of March 2005 on April 25, 2005, but incorrectly listed certain U.S. Environmental Protection Agency (EPA) registration numbers. The Santa Barbara CAC returned the PURs for correction. It was not until February 2006 that the Appellant submitted its PURs for 2005, a violation of 3 CCR section 6626(a). The Santa Barbara CAC found violation one to be a Class C violation and assessed a fine of \$50. The Appellant did not appeal this violation.

Violation two found that the Appellant had failed to provide soap at its decontamination site while its employee, Mr. Juan Munoz, was applying Rally 40 WSP, registration number 62719-410 and Captan 50 WP, registration number 51036-166. There is information in the record that the Captan 50 WP label, bearing the signal word "Danger," states under the heading, "Statement of Practical Treatment" that "If On Skin: Wash with plenty of soap and water." Mr. Tom Donlon, Agricultural Biologist Inspector, conducted a pesticide use monitoring inspection on February 2, 2006. During his inspection, Mr. Donlon found that no soap was available at the decontamination site, a violation of 3 CCR sections 6734(a) and (b). The Santa Barbara CAC found violation two to be a Class B violation and assessed a fine of \$250.

Violation three found that Appellant had failed to provide water of suitable quality for eyewash purposes at the site. On May 18, 2006, Mr. Juan Munoz was applying Danitol 2.4, EPA registration number 59639-35, Captec 4L, registration number 51036-181, and Success, registration number 62719-292. There is information in the record that shows the Danitol label, which bears the signal word, "Danger," states: "[Danitol] causes substantial but temporary eye injury." During his pesticide use monitoring inspection conducted on May 18, 2006, Mr. Tom Donlon, Agricultural Biologist Inspector, found that the emergency eyewash water available to Mr. Munoz was very dirty and unsuitable to use on eyes, a violation of 3 CCR section 6734(c). The Santa Barbara CAC found the violation to be a Class B violation and assessed a fine of \$350.

Appellant's Arguments

The Appellant argues in its appeal that the water found by the inspector was not green but was "in a readily available form." Appellant also argues that there were three different sources of water within a 500 foot radius; two within 100 feet of the applicator. Appellant argues that there were portable bathrooms on-site that hold water and soap. Finally, the Appellant argues that he was unable to attend due to illness, and that his representative did not have any of the information to give testimony on Appellant's behalf.

Analysis

3 CCR section 6734(a) provides in relevant part that the employer shall assure that sufficient water, soap, and single use towels for routine washing of hands and face and for emergency eye flushing is available for its employees. 3 CCR section 6734(a)(1) provides in relevant part that the water shall be of a quality and temperature that will not cause illness or injury when it contacts the skin or eyes or if it is swallowed. 3 CCR section 6734(b) provides in relevant part that a decontamination site shall be at the mixing/loading site or within ¼ mile from other handlers.

There is information in the record that provides both documentary and oral testimony by Mr. Donlon that substantiate the claim that there was no soap available at the decontamination site. Mr. Donlon testified that he did not observe any portable restrooms.

Regarding the quality of the emergency eyewash water, the Appellant argues that the water was not contaminated. The Appellant's argument is contradicted by both documentary evidence and testimony by Mr. Donlon. The inspection report written by Mr. Donlon states, "Emergency eyewash was very dirty and unsuitable to use on eyes." The Appellant's assertion that there were alternative sites with water available for emergency eyewash fails. The regulation states that "one pint of water for emergency eye flushing shall be immediately available (carried by the handler or on the vehicle or aircraft the handler is using) to each employee handling pesticides . . . if the pesticide product labeling requires protective eyewear." Immediately available is not within a 500 foot or a 100 foot radius; but rather, immediately available as defined in the regulation. Emergency eyewash is required as Danitol's label requires protective eyewear.

The Appellant's illness at the time of the hearing was not made an issue in the record; however, Manual Zepeda signed the hearing's "sign-in" sheet, although it was not indicated if it was Mr. Manual Zepeda, Sr., or Mr. Manual Zepeda, Jr.

Fine Levels

In all cases, the Santa Barbara CAC assessed fines at the lower end of the fine levels; hence, the fines are consistent with the reasoning stated during the hearing by the Santa Barbara CAC's advocate as adopted by the hearing officer's decision.

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Conclusion

The commissioner's decision is supported by substantial evidence.

Disposition

The commissioner's decision is affirmed in its entirety. The commissioner shall notify Appellant how and when to pay the \$800 fine.

Judicial Review

Under FAC section 12999.5, Appellant may seek court review of the Director's decision within 30 days of the date of the decision. Appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**

Dated: JUL 20 2007

By: 
Mary Ann Warner, Director